Section-By-Section Analysis of, S. 452
the Medicare Education and Regulatory Fairness Act of 2001 (MERFA)

Section 101. Prospective Application of Certain Regulations and Policy Changes.
In recent years, physicians and providers have been expected to comply with numerous regulations that were issued in the form of a proposed rule or an interim rule but never finalized, magnifying the uncertainty involved in attempting to comply with Medicare rules. This section would ensure that physicians and providers are subject to new regulations only when the Secretary has promulgated final regulations. HHS would have to issue a final rule one year after it has issued an interim final rule. Carriers would not be able to retroactively apply new policies to services provided before the date of the new policy issuance.

Section 102. Requirements for Judicial and Regulatory Challenges of Regulations.
This section would enable physicians and providers to legally challenge (1) the constitutionality of HHS statutes or regulations; (2) the Secretary s statutory authority to promulgate such regulations or policies; and (3) the Secretary s adherence to the Administrative Procedures Act (e.g. notice and comment period requirements).

Section 103. Prohibition of Recovering Past Overpayments by Certain Means.
Carriers and fiscal intermediaries (FI) would give physicians and providers who have received overpayments the option of either a three year repayment plan or offsetting overpayment recoupments against physicians future Medicare claims reimbursements.

Section 104. Prohibition of Recovering Past Overpayments if Appeal Pending.
Alleged overpayment amounts would be stayed during the period that physicians and providers have pending appeals to dispute the alleged overpayments. Currently, physicians and providers must repay alleged overpayments even while they are appealing the allegation.

Section 105. Prohibition of Random Prepayment Audits.
Carriers could not demand additional records or documentation prior to paying a claim absent cause.

Section 106. Exception for Prohibition on Waiving Medicare Copayment.
Physicians and providers could communicate to existing patients that, if financial hardship exists, the physician or provider would be willing to waive patients copayments -- without violating the anti-kickback statute.

Section 201. Construction of Hearing Rights Related to Decisions by the Secretary to Deny or Not Renew a Medicare Enrollment Agreement.
Physicians would be permitted to appeal carrier decisions to deny physicians Medicare enrollment applications or deny their reenrollment in the program. This provision is especially important in light of HHS plans to expand the enrollment process to all physicians.

Section 202. Reform of Post-Payment Audit Process.
- Physicians and providers could remit overpayments they have mistakenly received within one year without the fear of being targeted for an investigation or audit, as long as the carrier, FI, or DOJ/OIG have not already begun to audit or investigate the physician.
- Carriers and FIs would be required to notify rural physicians and providers by registered mail as soon as the carrier or FI has decided to conduct an audit.
- Extrapolation of alleged overpayment amounts to other non-audited claims would not occur the *first time* a physician or provider is assessed an alleged overpayment.
- Consent settlement letters would expressly give physicians and providers the right to administratively appeal overpayment allegations -- without agreeing to subject themselves to further audits.
- Consent settlement letters would clearly state that physicians and providers who agree to admit liability would be subject to future prepayment review.
- Prepayment review could no longer occur indefinitely after physicians and providers have submitted properly coded claims.

Section 204. Right to Appeal on Behalf of Deceased Beneficiaries.
Physicians and providers could appeal decisions on behalf of deceased Medicare patients where no substitute party is available.

Section 301. Designated Funding Levels for Physician and Provider Education.
HCFA carriers and fiscal intermediaries would work with health care associations to construct effective education programs. Physicians and providers could also submit claims to the HCFA carriers and FIs to examine whether coding, documentation, and billing errors have occurred. If the claim were improper, the physician or provider would either remit the overpayment to the carrier or FI or receive the additional payment from the carrier or the FI. Special outreach would occur to meet the needs of small employers. Education program attendance lists could not be used by the carriers or the FIs to target or investigate physicians or providers.

Section 302. Information Requests.
Physicians and providers could submit billing, documentation, coding, and cost reporting questions to carriers or fiscal intermediaries and receive a written response within 30 business days. Physicians and providers could rely on these written responses during audits. The Secretary would develop a system to make available to the public written responses to written policy questions submitted by health care associations. Carriers and FIs shall also provide written, mailed notice within 30 calendar days to physicians and providers of Medicare policy changes.

Section 401. Inclusion of Regulatory Costs in the Calculation of the Sustainable Growth Rate (SGR).
The Secretary would include costs of regulations promulgated after January 1, 2001, in the SGR calculation used to determine physician payment rates. Current law requires the Secretary to take regulations into account during calculation of the SGR; however, the Secretary has failed to undertake this effort.

Section 501. Policy Development Regarding E&M Documentation Guidelines.
HCFA may not implement new E&M documentation guidelines prior to the completion of at least four pilot E&M programs: one of which shall reflect a peer-reviewed method; one of which shall be conducted for services provided in a rural area; and one of which shall be conducted in a teaching setting.